

Feb 12, 2018

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LAFE EDWARD DAUGHERTY,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No.2:16-CV-00408-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 15, 25. Attorney Dana C. Madsen represents Lafe Edward Daugherty (Plaintiff); Special Assistant United States Attorney Summer Stinson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on November 22, 2013, Tr. 75, alleging

1 disability since January 1, 2008, Tr. 167, 173, due to seizures, depression, a back
2 injury, epilepsy, and polymicrogyria. Tr. 214. The applications were denied
3 initially and upon reconsideration. Tr. 102-09, 113-23. Administrative Law Judge
4 (ALJ) Donna L. Walker held a hearing on January 20, 2016 and heard testimony
5 from Plaintiff, medical expert, Ronald Devere, M.D., and vocational expert,
6 Richard Cheney. Tr. 39-74. At the hearing, the ALJ granted Plaintiff's motion to
7 withdraw his Request for Hearing on the DIB claim. Tr. 41-42. The DIB claim
8 was dismissed and the hearing continued as an SSI only claim with an application
9 date of November 22, 2013.¹ *Id.* The ALJ issued an unfavorable decision on
10 February 8, 2016. Tr. 23-24. The Appeals Council denied review on September
11 28, 2016. Tr. 1-7. The ALJ's February 8, 2016 decision became the final decision
12 of the Commissioner, which is appealable to the district court pursuant to 42
13 U.S.C. § 405(g). Plaintiff filed this action for judicial review on November 21,
14 2016. ECF Nos. 1, 4.

15 **STATEMENT OF FACTS**

16 The facts of the case are set forth in the administrative hearing transcript, the
17 ALJ's decision, and the briefs of the parties. They are only briefly summarized
18 here.

19 Plaintiff was 39 years old at the date of application. Tr. 167. He completed
20 the twelfth grade in 1992. Tr. 215. His reported work history includes the jobs of
21 inspector and machine operator. Tr. 197, 215. Plaintiff reported that he stopped
22 working on January 1, 2008 due to his conditions. Tr. 214.

23
24 ¹It is unclear whether Plaintiff's appeal to this Court includes his DIB Claim.
25 His Complaint specifically requests this Court set aside the Commissioner's
26 decision in both the DIB and the SSI claims, ECF No. 4 at 2, but Plaintiff's
27 briefing only addresses the SSI claim, ECF No. 15 at 1. This order will address
28 both the DIB and the SSI claims.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
24 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
25 proof rests upon the claimant to establish a *prima facie* case of entitlement to
26 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
27 claimant establishes that physical or mental impairments prevent him from
28 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant

1 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
2 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
3 other work, and (2) specific jobs which the claimant can perform exist in the
4 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1194
5 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
6 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

7 **ADMINISTRATIVE DECISION**

8 On February 8, 2016, the ALJ issued a decision finding Plaintiff was not
9 disabled as defined in the Social Security Act.

10 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
11 activity since January 3, 1999, the original alleged date of onset. Tr. 25.

12 At step two, the ALJ determined Plaintiff had a severe impairment of
13 "history of a seizure disorder." Tr. 25.

14 At step three, the ALJ found Plaintiff did not have an impairment or
15 combination of impairments that met or medically equaled the severity of one of
16 the listed impairments. Tr. 28.

17 At step four, the ALJ assessed Plaintiff's residual function capacity and
18 determined he could perform a range of work at the medium exertional level with
19 the following limitations:

20 the ability to lift and/or carry up to 50 pounds occasionally (1/3 of the
21 workday) and 25 pounds frequently (2/3 of the workday); stand and/or
22 walk up to 6 hours; and sit up to 6 hours. He has an unlimited ability
23 to use bilateral upper extremities for pushing and pulling (other than as
24 stated for lifting and carrying); unlimited ability to reach in all
25 directions, including overhead bilaterally; unlimited use of bilateral
26 hands for handling (gross manipulation), fingering (fine manipulation),
27 and feeling (skin receptors); unlimited postural ability to balance, stoop
28 (including bending at the waist), kneel or crouch (including bending at
the knees) and frequently climb ramps, stairs, or crawl but never climb
ladders, ropes or scaffolds; unlimited visual and communicative
abilities; unlimited environmental exposure to exposure to [sic.]

1 extreme cold, extreme heat, wetness, humidity, noise, fumes, odors,
2 dusts, gases, or poor ventilation but should avoid concentrated exposure
3 to vibration and hazards (such as machinery and heights). He can have
4 superficial contact with the general public, could work in proximity to
5 but not close cooperation with co-workers and supervisors, and would
work best in a job with routine predictable tasks with clearly set goals
and expectation.

6 Tr. 28-29. The ALJ concluded that Plaintiff did not have past relevant work. Tr.
7 32.

8 At step five, the ALJ determined that, considering Plaintiff's age, education,
9 work experience and residual functional capacity, and based on the testimony of
10 the vocational expert, there were other jobs that exist in significant numbers in the
11 national economy Plaintiff could perform, including the jobs of pile setter², store
12 laborer, and janitor. Tr. 33. The ALJ concluded Plaintiff was not under a
13 disability within the meaning of the Social Security Act at any time from January
14 3, 1999, through the date of the ALJ's decision. Tr. 33.

15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's
17 decision denying benefits and, if so, whether that decision is based on proper legal
18 standards. Plaintiff contends the ALJ erred by (1) failing to make a proper step
19 two determination, (2) failing to make a proper step three determination, (3) failing
20 to properly weigh Plaintiff's symptom statements, and (4) failing to properly weigh
21 the medical opinions in the record.

22 1. Step Two

23 Plaintiff challenges the ALJ's step two determination alleging that she erred

25 ²At the hearing, the vocational expert testified that Plaintiff could perform
26 the job of "tile fitter," not "pile setter." Upon remand, the ALJ is to accurately
27 reproduce the vocational expert's testimony if she relies on it in making her
28 determination.

1 by finding Plaintiff's mental health impairments and back/lumbar spine
2 impairment nonsevere. ECF No. 15 at 12-13.

3 The step-two analysis is "a de minimis screening device used to dispose of
4 groundless claims." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
5 impairment is "not severe" if it does not "significantly limit" the ability to conduct
6 "basic work activities." 20 C.F.R. § 416.922(a). Basic work activities are
7 "abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 416.922(b). "An
8 impairment or combination of impairments can be found not severe only if the
9 evidence establishes a slight abnormality that has no more than a minimal effect on
10 an individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
11 1996) (internal quotation marks omitted).

12 **A. Mental Health Impairments**

13 The ALJ found Plaintiff's mental health impairments to be nonsevere. Tr.
14 26. In doing so, she discounted the opinion of examining psychologist, John
15 Arnold, Ph.D. Tr. 26-28.

16 On January 13, 2016, Dr. Arnold evaluated Plaintiff, reviewed his medical
17 records, and administered a Millon Clinical Multi-Axial Inventory, third edition
18 (MCMI-III) and a mental status exam. Tr. 424-31. Dr. Arnold diagnosed Plaintiff
19 with early onset persistent depressive disorder, generalized social phobia, schizoid
20 personality disorder with dependent, depressive, and passive-aggressive features,
21 and rule out somatic symptom disorder. Tr. 428. He opined that Plaintiff had a
22 marked limitation in two areas of mental functioning and a moderate limitation in
23 seven areas of mental functioning. Tr. 429-31.

24 The ALJ gave this opinion little weight because (1) the opinion was not
25 supported by the evaluation, (2) it was inconsistent with Plaintiff's reported
26 activities, and (3) there was no basis for the opined limitations in the abilities to
27 accept-instructions and respond to criticism. Tr. 28.

28 An examining physician's opinion that is not contradicted by another

1 physician, can only be rejected for “clear and convincing” reasons. *Lester v.*
2 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Likewise an examining physician’s
3 opinion that is contradicted by another physician, can only be rejected for “specific
4 and legitimate reasons.” *Id.* at 830-31. The specific and legitimate standard can be
5 met by the ALJ setting out a detailed and thorough summary of the facts and
6 conflicting clinical evidence, stating her interpretation thereof, and making
7 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
8 required to do more than offer her conclusions, she “must set forth [her]
9 interpretations and explain why they, rather than the doctors’, are correct.”
10 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

11 None of the reasons provided by the ALJ meet the lesser standard of specific
12 and legitimate. First, the ALJ found that the opinion was not supported by the
13 claimant’s mental status examination, his reports during the evaluation, or his
14 mildly elevated scores. Tr. 28. Plaintiff’s mental status exam showed his mood to
15 be severely anxious and mildly depressed with a moderately constricted affect. Tr.
16 426. Otherwise the rest of the exam was within normal limits. *Id.* The MCMI-III
17 showed a valid and reliable score that evidenced a mild clinical elevation
18 supporting persistent depressive disorder, which is characterized as “two or more
19 years of fairly continuous depressive symptoms.” Tr. 427. The test also showed
20 severely elevated scores on the anxiety scale consistent with “overall arousal and
21 general angst.” *Id.* Additionally, the test showed significant elevations on both the
22 schizoid and dependent scales. *Id.* Dr. Arnold stated that “[t]hese scale elevations
23 appear consistent with his self-reported chronic social alienation.” *Id.*

24 In finding that the mental status exam, Tr. 426, was inconsistent with the
25 opinion, the ALJ failed to draw any connection between the results of the mental
26 status exam and the opined limitations and explain how they are inconsistent. Tr.
27 28. Likewise, the ALJ found Plaintiff’s statements and the results of the MCMI-
28 III, Tr. 427, were inconsistent with the opinion without providing any explanation.

1 Tr. 28. The ALJ simply asserted these were inconsistent with the opinion. *Id.*
2 This is not sufficient to meet the specific and legitimate standard under *Magallanes*
3 and *Embrey*.

4 Second, the ALJ found that Dr. Arnold's opinion was inconsistent with
5 Plaintiff's reported activities, more specifically that "a life revolving around video
6 gaming with others does not substantiated [sic.] marked limitations for working in
7 coordination with others." Tr. 28. This is not supported by substantial evidence.

8 In addressing Plaintiff's activities of daily living, Dr. Arnold stated:

9 Mr. Daugherty's lifestyle appears to adhere to a more textbook schizoid
10 and dependent pattern. He has lived with his sister and brother-in-law
11 since 1999. He added it is hard to get along with these people at times
12 (who have let him live with them the past 15-16 years). He is a self-
13 described night person, who gets up between midnight and 2am. He has
14 a penchant for "MMO" on-line multiplayer video games. In point of
15 fact aside from one close friend, these on-line relationships of sorts
16 constitute his social life. He especially likes Star Trek-related games,
17 and is an admitted 'Trekie.' Outside of his 3-D computer artwork, Mr.
Daugherty endorsed investing eight to nine hours a day playing these
games. The rest of his time is usually divided between watching TV and
doing his leatherwork.

18
19 Tr. 427. Dr. Arnold found that Plaintiff had a marked limitation in the ability to
20 work in coordination with or proximity to others without being distracted by them.
21 Tr. 430. A marked limitation is defined as a "[f]requent interference on the ability
22 to function in a work setting (i.e., 1/3 to 2/3 of an 8 hour workday)." Tr. 429.
23 Despite the ALJ's assertion otherwise, an inability to work in proximity to others is
24 not inconsistent with an individual whose social life is limited to online-gaming.
25 As such, this was an error.

26 Third, the ALJ found that there was no basis for Dr. Arnold's opinion that
27 Plaintiff had marked limitations in accepting instructions and responding to
28 criticism. Tr. 28 referring to Tr. 430. Once again, the ALJ simply stated "there is

1 no basis for Dr. Arnold's speculation that the claimant was markedly limited for
2 accepting instructions and responding to criticism." Tr. 28. A mere conclusion
3 that the limitation is unsupported is insufficient to meet the specific and legitimate
4 standard. *See Embrey*, 849 F.2d at 421-22. Additionally, the results from the
5 MCMI-III administered by Dr. Arnold appear to support limitations in regards to
6 social functioning, "[t]hese scale elevations appear consistent with his self-reported
7 chronic social alienation," and "a relatively lower level of confidence, his profile
8 also suggests mild depressive and passive-aggressive features." Tr. 427. The
9 medical expert, a neurologist, who testified at the hearing, did not have access to
10 Dr. Arnold's report. Tr. 43-44. Without expert testimony the ALJ is not in a
11 position to decipher how a score on the MCMI-III would correlate with mental
12 functional limitations, specifically the abilities to accept instructions and respond
13 to criticism. *See Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) (the ALJ
14 "must be careful not to succumb to the temptation to play doctor"). In conclusion,
15 the ALJ failed to provide legally sufficient reason supported by substantial
16 evidence to reject Dr. Arnold's opinion.

17 Because the finding of no impairment relies upon the erroneous rejection of
18 a medical opinion supporting the impairment the ALJ's step two determination was
19 an error. Defendant argues that even if there was an error at step two, that error
20 would be harmless. ECF No. 25 at 6. Defendant is accurate that a step two error
21 can be harmless when step two is resolved in the claimant's favor. *See Burch v.*
22 *Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005); *see also Molina v. Astrue*, 674 F.3d
23 1104, 1115 (9th Cir. 2012) (holding that "in each case we look at the record as a
24 whole to determine whether the error alters the outcome of the case.").

25 In this case, despite the ALJ's step two determination, the residual functional
26 capacity determination addressed mental health limitations: "He can have
27 superficial contact with the general public, could work in proximity to but not
28 close cooperation with co-workers and supervisors, and would work best in a job

1 with routine predictable tasks with clearly set goals and expectation.” Tr. 29.
2 Therefore, Defendant’s argument that the ALJ’s error was harmless is not without
3 merit. However, the ALJ’s error was not just his step determination, but his
4 rejection of Dr. Arnold’s opinion, which included more severe limitations than
5 addressed in the residual function determination at step four. Therefore, the ALJ’s
6 error was not harmless and the case is remanded for the ALJ to readdress Dr.
7 Arnold’s opinion and make a new step two determination.

8 **B. Back/Lumbar Spine Impairment**

9 Plaintiff challenges the ALJ’s determination that his back/lumbar spine
10 impairment is nonsevere. ECF No. 15 at 13.

11 The record shows that on June 7, 2004, G.W. Bagby, M.D. completed an
12 evaluation of Plaintiff for the Washington Department of Social and Health
13 Services (DSHS). Tr. 291-96. As part of the evaluation, Dr. Bagby ordered x-rays
14 of Plaintiff’s lumbar spine, which revealed “[m]oderate degenerative facet disease
15 at L5-S1.” Tr. 294. Dr. Bagby opined that Plaintiff’s physical problems stem from
16 his seizures and inguinal hernia and he was able to do light work. Tr. 293.
17 Plaintiff complained of some low back pain to J. Robert Clark, M.D. on November
18 29, 2004. Tr. 336. On May 15, 2014, June 19, 2014, and March 26, 2015,
19 Plaintiff’s symptom complaints were negative for back pain. Tr. 409, 412, 418.
20 On December 30, 2015, Plaintiff reported upper back pain since 1999. Tr. 425.

21 The ALJ found Plaintiff’s back/lumbar spine impairment to be a nonsevere.
22 Tr. 26. He acknowledged that x-rays from June of 2004 showed moderate
23 degenerative facet disease at L5-S1, but found that Plaintiff failed to seek any
24 treatment for back pain since his amended alleged disability onset date of
25 November 22, 2013. *Id.*

26 The ALJ is accurate that one abnormal x-ray that predates the relevant time
27 period without more is not sufficient to support a severe impairment at step two as
28 there is little evidence to support the notion that the impairment affects Plaintiff’s

1 ability to work during the relevant time period. *See* 20 C.F.R. §§ 416.921;
2 416.922. In the decision, the ALJ found that the 2004 x-rays predated Plaintiff's
3 amended onset date of November 22, 2013. Tr. 26. However, her decision is
4 clearly for January 3, 1999 to February 8, 2016. Tr. 28-33. While the evidence of
5 Plaintiff's back pain may be limited, the x-rays do not predate the period
6 addressed by the ALJ's decision. Therefore, on remand, the ALJ will accurately
7 define the relevant time period and determine an onset date that is supported by the
8 record as a whole under S.S.R. 83-20 and address Plaintiff's back/lumbar spine
9 impairment anew in the context of a clearly defined relevant time period.

10 **2. Step Three**

11 Plaintiff alleges that the ALJ failed to consider Plaintiff's focal seizures
12 when considering listings at step three. ECF No. 15 at 15.

13 In her decision, the ALJ addressed Listings 11.02 and 11.03. Tr. 28. Listing
14 11.02 addresses convulsive epilepsy, including grand mal and psychomotor
15 seizures, and Listing 11.03 addresses nonconvulsive epilepsy, including petit mal,
16 psychomotor, or focal seizures. 20 C.F.R. § 404, Subpart P, App. 1, Listing 11.00
17 (2016).³ The ALJ considered the frequency of Plaintiff's grand mal seizure
18 activity when addressing the listings, but did not address Plaintiff's alleged
19 nonconvulsive seizures or their alleged frequency. Tr. 28. Evidence in the file and
20

21 ³On July 1, 2016, Social Security issued the Revised Medical Criteria for
22 Evaluating Neurological Disorders. Listing 11.03 was removed and reserved and
23 Listing 11.02 was expanded to cover all seizure activity. *See* Revised Medical
24 Criteria for Evaluating Neurological Disorders, 81 Fed. Reg. 43048 (July 1, 2016),
25 available at 2016 WL 3551949. The new listings took effect on September 29,
26 2016. *Id.* The Revised Medical Criteria for Evaluating Neurological Disorders
27 directs reviewing courts to review the Commissioner's final decisions using the
28 listing that was in effect at the time the decisions were issued. *Id.*

1 the expert testimony at the hearing suggests that additional medical evidence is
2 necessary to establish the existence of these focal seizures. Tr. 52, 393. However,
3 the ALJ's decision found "history of a seizure disorder" as a severe impairment at
4 step two and the ALJ's decision failed to address these alleged focal seizures. Tr.
5 25. This was error. Therefore, upon remand, the ALJ will readdress step three and
6 the ALJ will address Plaintiff's alleged nonconvulsive seizures.

7 **3. Plaintiff's Symptom Statements**

8 Plaintiff contests the ALJ's determination that Plaintiff's symptom
9 statements were less than fully credible. ECF NO. 15 at 15-17.

10 It is generally the province of the ALJ to make credibility determinations,
11 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
12 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
13 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
14 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
15 *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must
16 identify what testimony is not credible and what evidence undermines the
17 claimant's complaints." *Lester*, 81 F.3d at 834.

18 The ALJ found Plaintiff' symptom statements to be less than fully credible
19 concerning the intensity, persistence, and limiting effects of his symptoms. Tr. 30.
20 The ALJ reasoned that Plaintiff was less than fully credible because (1) his medical
21 records contradicted his allegations, (2) he did not follow prescribed treatment, and
22 (3) his report of going to bed around noon and rising at midnight contradicted his
23 alleged sleep difficulties.

24 The evaluation of a claimant's symptom statements and their resulting
25 limitations relies, in part, on the assessment of the medical evidence. *See* 20
26 C.F.R. § 416.929(c); S.S.R. 16-3p. Therefore, in light of the case being remanded
27 for the ALJ to address the medical source opinions in the file, a new assessment of
28 Plaintiff's subjective symptom statements is necessary in accord with S.S.R. 16-3p.

1 **4. Medical Opinions**

2 Plaintiff argues the ALJ failed to properly consider and weigh the medical
3 opinions expressed by Ronald Devere, M.D., J. Robert Clark, M.D., and Diane
4 Beernink, ARNP. ECF No. 15 at 17-19.

5 In weighing medical source opinions, the ALJ should distinguish between
6 three different types of physicians: (1) treating physicians, who actually treat the
7 claimant; (2) examining physicians, who examine but do not treat the claimant;
8 and, (3) nonexamining physicians who neither treat nor examine the claimant.
9 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
10 treating physician than to the opinion of an examining physician. *Orn v. Astrue*,
11 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ should give more weight to
12 the opinion of an examining physician than to the opinion of a nonexamining
13 physician. *Id.*

14 When a treating physician's opinion is not contradicted by another
15 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
16 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
17 physician's opinion is contradicted by another physician, the ALJ is only required
18 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
19 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
20 physician's opinion is not contradicted by another physician, the ALJ may reject
21 the opinion only for "clear and convincing" reasons, and when an examining
22 physician's opinion is contradicted by another physician, the ALJ is only required
23 to provide "specific and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d
24 at 830-31.

25 The specific and legitimate standard can be met by the ALJ setting out a
26 detailed and thorough summary of the facts and conflicting clinical evidence,
27 stating her interpretation thereof, and making findings. *Magallanes*, 881 F.2d at
28 751. The ALJ is required to do more than offer her conclusions, she "must set

1 forth [her] interpretations and explain why they, rather than the doctors', are
2 correct." *Embrey*, 849 F.2d at 421-22.

3 **A. Ronald Devere, M.D.**

4 Dr. Devere testified at the January 20, 2016 hearing and found Plaintiff
5 capable of medium work. Tr. 48-49. The ALJ discussed the opinion, but failed to
6 provide any specific weight to it in her decision. Tr. 31-32. Considering the case
7 is being remanded for the ALJ to make a new step two determination, upon
8 remand, the ALJ will address the opinion and provide it specific weight.

9 **B. J. Robert Clark, M.D.**

10 Dr. Clark provided opinions in May of 2004 and March of 2005 that
11 Plaintiff was able to perform medium work. Tr. 325-28, 341-44. The ALJ gave
12 these opinions significant weight. Tr. 32. Despite this, the ALJ appeared to
13 overlook Dr. Clark's opinion that Plaintiff had a marked limitation in the abilities
14 to communicate and understand or following directions in the May 2004 opinion,
15 Tr. 327, and a moderate limitation in the same areas in the March 2005 opinion.
16 Tr. 434. Social Security Ruling (S.S.R.) 96-8p states that the residual functional
17 capacity assessment "must always consider and address medical source opinions.
18 If the [residual functional capacity] assessment conflicts with an opinion from a
19 medical source, the adjudicator must explain why the opinion was not adopted."
20 Here the ALJ failed to state why this portion of Dr. Clark's opinion was omitted
21 from the residual functional capacity determination when he gave the opinions
22 significant weight. Therefore, upon remand, the ALJ will readdress Dr. Clark's
23 opinions.

24 **C. Diane Beernink, ARNP**

25 On September 18, 2013, Nurse Beernink completed a Physical Functional
26 Evaluation form for DSHS in which she opined that Plaintiff was limited to
27 sedentary work and had a marked limitation in sitting, standing, walking, lifting,
28 carrying, handling, pushing, pulling, reaching, stooping crouching, seeing, hearing,

1 and communicating. Tr. 392-93. She stated that Plaintiff needed a neurological
2 consultation with an EEG to determine whether or not Plaintiff was having
3 seizures. Tr. 393.

4 The ALJ gave this opinion little weight because Plaintiff had not taken his
5 medication since early 2011 and despite the lack of medication, Plaintiff's seizure
6 activity was limited to every six months. Tr. 32. The Court acknowledges that
7 Nurse Beernink is not an acceptable medical source under the regulations as of the
8 date of the ALJ's decision and, as so, the ALJ was only required to provide
9 germane reasons for rejecting her opinion. 20 C.F.R. § 416.913(a) (2016)⁴;
10 *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993). However, considering the case is
11 being remanded for the ALJ to make a new step two determination and address
12 Plaintiff's alleged focal seizures with more specificity, the ALJ will readdress
13 Nurse Beernink's opinion.

14 **REMEDY**

15 The decision whether to remand for further proceedings or reverse and
16 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
17 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
18 where "no useful purpose would be served by further administrative proceedings,
19 or where the record has been thoroughly developed," *Varney v. Secretary of Health
& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
21 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
22 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)

23
24 ⁴On March 27, 2017, this regulation was amended and the definitions of an
25 acceptable medical source now appear in 20 C.F.R. § 416.902(a) and in claims
26 filed with the agency after March 27, 2017, a nurse practitioner will be considered
27 an acceptable medical source. Since Plaintiff filed this claim in 2013, this new rule
28 is not applicable.

1 (noting that a district court may abuse its discretion not to remand for benefits
2 when all of these conditions are met). This policy is based on the “need to
3 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
4 outstanding issues that must be resolved before a determination can be made, and it
5 is not clear from the record that the ALJ would be required to find a claimant
6 disabled if all the evidence were properly evaluated, remand for further
7 proceedings is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th
8 Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

9 In this case, it is not clear from the record that the ALJ would be required to
10 find Plaintiff disabled if all the evidence were properly evaluated. Further
11 proceedings are necessary for the ALJ to address the opinion of Dr. Arnold and
12 make a new step two determination, accurately identify the relevant time period in
13 the case, consider whether there is objective medical evidence to support the
14 Plaintiff’s alleged focal seizures in order to make a new step three determination,
15 readdress Plaintiff’s symptom statements, and properly address all the medical
16 source opinions in the file. Additionally, the ALJ will need to supplement the
17 record with any outstanding evidence and call a medical, a psychological, and a
18 vocational expert to testify at a new hearing.

19 Considering Plaintiff was unclear as to his intentions regarding the
20 resurrection of his DIB claim on this appeal, the Commissioner will set aside
21 Plaintiff’s withdrawal of his Request for Hearing in the DIB claim and consider
22 both the DIB and the SSI claims upon remand. If it was not Plaintiff’s intention to
23 appeal the DIB claim, on remand he can renew his motion to withdraw his Request
24 for Hearing.

25 CONCLUSION

26 Accordingly, **IT IS ORDERED:**

27 1. Defendant’s Motion for Summary Judgment, ECF No. 25, is

28 **DENIED.**

1 2. Plaintiff's Motion for Summary Judgment, ECF No. 15, is
2 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
3 additional proceedings consistent with this Order.

4 3. Application for attorney fees may be filed by separate motion.

5 The District Court Executive is directed to file this Order and provide a copy
6 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
7 and the file shall be **CLOSED**.

8 DATED February 12, 2018.



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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE